IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/06/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL No.1808 OF 1991
AND
CROSS OBJECTION No.69 OF 1992

Dr.V.S.Mani .. Appellant in the second appeal
& respondent in the cross-
objection

-Vs-

Dr.K.Rajendran .. Respondent in the second appeal
& cross-objector in the
cross-objection

Second Appeal preferred under Section 100 C.P.C., praying for the
relief as stated therein.

!For Appellant in the second appeal : Mr.S.Desikan
& respondent in the cross- Senior Counsel for
objection Ms.Sheela Rajakumar

^For Respondent in the second appeal
& cross-objector in the
cross-objection : Mr.K.Raghunathan

:JUDGMENT
This Second Appeal is preferred against the judgment and decree dated 18.9.1991 made in A.S.No.37 of 1991 by the Court of District Judge, Cuddalore, thereby confirming the judgment and decree dated 31.10.1 990 made in the final decree petition in I.A.No.88 of 1983 in O.S.No.783 of 1980 by the Court of Subordiante Judge, Cuddalore.

2. Tracing the history of the above second appeal coming to be preferred by the respondent/defendant in I.A.No.88 of 1983 in O.S.No.783 of 1980, it comes to be known that the respondent herein has filed the suit for partition and separate possession of his 13/20 shares in the suit property, for a direction to render accounts for the income in the suit property from the date of plaint, for the appointment of a commission for division of the properties and determination of the income and for costs wherein the suit property is a house and site falling under Door No.208, situate at Manjakuppam Napier Road, Cuddalore Taluk measuring 3845 sq.ft., on averments such as that

the property originally belonged to one Rama Iyengar; that on his death it devolved on his sons Raghunathan, Rajagopalan, Krishnasami, Soundararajan and Narayanan, each having 1/5 share; that the said Rajagopalan and Narayanan had executed a registered release deed in favour of their brother Raghunathan on 06.09.1948; that the said soundarajan died leaving his widow Alamelu and only son C.R. Rangan; that the said C.R. Rangan also died in 1960, leaving his mother Alamelu widow Sunidhi and two minor daughters Savithiri and Usha; that the said Alamelu, Sunidhi, Savithiri and Usha were each entitled to 1/4 share of 1/5 share of Soundararajan; that even during the life time of Raghunathan, he obtained release deed from his son C.R.Kannan in respect of his rights on 06.06.1953; that after the death of Raghunathan his share viz., 8/15 (2/5 share obtained by way of release, his own 1/5 share and 1/15th share obtained by way of release from C.R.Kannan) devolved on his sons Ranganathan and C.R. Kannan; that while so, Ranganathan obtained a registered release deed from Alamelu, mother of C.R. Rangan in respect of her 1/20 share; and became entitled to 23/60 shares; and that Kannan was entitled to 4/15 shares inherited from his father; that the said Ranganathan and Kannan sold their entire shares to the plaintiff under two registered sale deeds dated 20.06.1980 and 20.05.1980 respectively.

3. The petitioner/plaintiff has filed an application in O.S.No.783 of 1980 on the file of Principal Subordinate Judge, Cuddalore to appoint a Commission for division of the properties and allotting 13/20 shares to the petitioner and to deliver mesne profits from the suit property from the date of plaint, viz., from 26.11.1980 till the date of delivery.

4. The respondent/defendant has filed a counter stating that the application for passing of final decree is most vexatious, unsustainable and has to be dismissed; that the respondent has preferred an appeal against the decree and judgment in A.S.No.223 of 1982 and the District Court has passed an order of stay and that the appointment of a Commission can be ordered only after the disposal of the appeal further denying that the petitioner is entitled to 13/20 shares and to the mesne profits from 26.11.1980.

5. The Advocate Commissioner in his report has stated that the entire property is marked as A,D,F,G and it measures 3871.75 sq.ft. In this on the Northern side 13/20 shares are marked as A,D,E,H and it measures 2544 sq.ft. and on the Southern side 7/20 shares are marked as H,E,F,G and it measures 1327.75 sq.ft.; that there is a common pathway leading to South Kavarai Street from the suit properties as marked in the plan and he has been directed to provide a pathway to the defendant to reach the said pathway. So he has demarcated the portion marked as BCDELKJI in the plan which measures 128 sq.ft. which has to be deducted in the portion allotted to the plaintiff reducing it to 2416 sq.ft. In this the portion marked as BCJI may be kept as common to both parties and the portion marked CDELKJ may be allotted to defendant and his share will be increased to 1439.75 sq.ft. The Advocate Commissioner examined the petitioner as P.W.1 and the respondent as R.W.1. According to P.W.1, the building on his side is not in a usable condition and is worth Rs.14,000/- and on the respondent's side is worth Rs.10,000/-. The evidence of R.W.1 is not uniform. When the P.W.1 was cross examined he had suggested the value of the well at Rs.20,000/- but R.W.1 has deposed that the value is Rs.6,000/-. According to R.W.1 all the wood are teak wood worth

Rs.5,000/- but in the cross, he would say that he has no idea about the price of the wood. R.W.1 has deposed that the wood in the petitioner's side is worth Rs.45,000/- to Rs.50,000/-. When he was challenged as to whether he was prepared to purchase the same for the said value, he refused. It shows that the value is not only imaginary but an exaggerated version.

6. On 31.10.1990, the learned Subordinate Judge, Cuddalore passed final decree allotting 13/20 shares to the plaintiff as per the Commissioner's Report marked as 'A,D,E & H' and that there is common path way leading to South Kavarai Street from the suit properties as marked in the plan as 'B,C,D,E,L,K,J,I and the Subordinate Judge has directed that the respondent/defendant is also entitled to use the pathway and it shall not be objected by the petitioner/plaintiff.

7. Challenging the judgment of final decree, the respondent/ appellant preferred an Appeal suit in A.S.No.37 of 1991 and Cross objection on the file of District Judge, Cuddalore.

8. On pleadings by parties, the learned District Judge, Cuddalore has passed a final decree dismissing the appeal and cross objection thus confirming the judgment of the lower Court. It is seen from the Judgment of the Appellate Court that the appellant as R.W.1 has admitted in his evidence before the Commissioner that he had no objection to the petitioner taking the Northern share. So, it is a decree by consent. Therefore no appeal is maintainable as against the allotment as per Section 96 C.P.C. Further in the earlier stage, when objection was made to the Commissioner to demarcate his 13/20 shares, the appellant took the matter in revision on the file of this Court and this Court has confirmed the same in C.R.P.No.2846 of 1984.

9. It is only against these concurrent judgments delivered by both the trial court and the first appellate court, the respondent/ defendant in I.A.No.88 of 1983 in O.S.No.783 of 1990, the appellant before the first appellate court, has come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of second appeal and for determination of the following substantial questions of law:-

1) Whether the Court below has not erred in law in holding that the application for passing of final decree would be barred by res judicata by virtue of the judgment in C.R.P.2846 of 1984?

2) Whether the Court below has not failed to see that the consent given for a portion of the properties would not in any way prevent the appellant herein from claiming proper and equitable division by metes and bounds?

3) Whether the Court below has not erred in accepting the report filed by the Commissioner contrary to the decision in 1989-I-L.W. 489 wherein it has been clearly stated that the commissioner should give details regarding the valuation made by him and the documents that were relied upon by him to arrive at such valuation?

10. A Cross Objection has been filed by the respondent/plaintiff on averments such as the judgment and decree of the Courts below insofar as the claim of the cross objector has been rejected contrary to law; that the Courts below erred in not awarding mesne profits especially when a specific direction had been given in A.S.No.76 of 1987 on the file of the District Court, Cuddalore while remitting the matter for disposal to the trial Court; that the courts below overlooked that the cross objector is entitled to compensation especially when the respondent/appellant has been given a right of pathway over the land allotted to the cross objector; that the Courts below failed to note that the Cross Objector is entitled to owelty and mesne profits.

11. During arguments, the learned senior counsel appearing on behalf of the appellant/defendant would submit that the shares have been determined and the plaintiff has filed the final decree application, but the mode of division is disputed; that by working out, it should not cause hardship to others. Citing the Commissioner's plan from the typed set of papers, the learned senior counsel would exhort that from ut of the entire area of 3871.75 sq.ft., the appellant is entitled to 1300 sq.ft. The learned senior counsel would further point out that the appellant has to provide a corridor, but there is no purpose in reducing his breadth by 10 ft. At this juncture, the learned senior counsel would cite two judgments, the first one rendered by a learned single judge of this Court in V.S.SUBBA REDDIAR AND ANOTEHR vs. SEETHARAMAN AND OTHERS reported in AIR 1972 Madras 421 wherein it has been held:

"The High Court's order in revision confirming the trial Court's order refusing to entertain the additional written statement raising the plea of res judicata being an interlocutory decision cannot take away the substantive right to raise the plea of res judicata which is legally available and the plea can be agitated even at the second appellate stage."

12. The second judgment cited by the learned senior counsel for the appellant is one rendered by a single Judge of the Punjab and Haryana High Court in KARAM SINGH VS. JAGTA AND OTHERS reported in AIR 1982 Punjab and Haryana 51. In the said judgment, while considering the point `whether the order of the High Court passed in revision would either operate as res judicata or bar for the appellant to re-agitate the same matter either before the first appellate court or before the High Court in appeal', the learned judge of the Punjab and Haryana High Court, following the earlier decisions reported in (1) ILR (1970) 1 Punjab and Haryana 533, (2) AIR 1973 Punjab and Haryana 392 and (3) 1980 Rev.LR 132, has held that 'if any interlocutory order was passed by the trial court which was subject-matter of revision in this Court and the revision was dismissed with one word order 'dismissed' that would not operate as res judicata nor debar the aggrieved party to re-agitate the matter in the first or a second appeal.'

13. The learned senior counsel would end up his argument praying to direct the lower Court to allot him such portion. On such arguments, the learned senior counsel would pray to allow the above appeal setting aside the orders passed by the trial Court and the appellate Court as

well.
14. In reply, the learned counsel appearing on behalf of the respondent would point out that the properties have been divided into Northern portion and Southern portion; that the respondent had to file the objections to the Commissioner's report dated 29.10.1990 in I.A.No.8 8 of 1983. The learned counsel would submit that it is the constructive res judicata that is applicable to the case in hand; that he has raised such a point and the lower Court has considered the same; that he is entitled to the right of passage. On such arguments, the learned counsel for the respondent/plaintiff would ultimately pray to dismiss the above second appeal and allow the cross-objection filed by him.
15. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both what comes to be known is that it is a second appeal arising out of a final decree petition filed in I.A.No.88 of 1983 in O.S.No.783 of 1 980 on the file of the Court of Subordinate Judge, Cuddalore by the respondent herein seeking to implement the preliminary decree passed by the said Court allotting 13/20 shares in favour of the respondent/ plaintiff and the said Court having taken up the final decree petition on file and appointing a commission, on receipt of the report and sketch of the Commissioned filed in accordance with the preliminary decree, has passed its final decree partitioning the suit property and allotting 13/20 shares in favour of the respondent/plaintiff in the manner shown in the orders passed by the said Court dated 31.10.1990, testifying the validity of which the appellant herein has preferred an appeal in A.S.No.37 of 1991 on the file of the Court of Principal District Judge, Cuddalore and the respondent has also filed a crossobjection and the said Court also having gone into the facts and circumstances of the case, would ultimately concur with the decision arrived at by the Court of execution as per its judgment dated 18.9.1991 against which the defendant has come forward to file the above second appeal on grounds such as that the Courts below have failed to see that the consent was only insofar as the shares of the respondent was concerned and not for the mode of division and it would not in any way affect the right of the appellant to claim a fair and equitable division in respect of the share that he becomes entitled to and therefore merely for giving the consent for the partition of the property, the principle of res judicata would not become applicable in any manner and that the appellant would not be disentitled from claiming allotment of such portion of the property that would be sufficient to satisfy his share.

16. The appellant would also agitate against the allocation of the Northern portion of the property which has been misconstrued by the lower Courts that his claim is only that of the Northern portion but in fact, the appellant had merely stated that the valuation of the Northern portion is more than the Southern portion and therefore equitable division of the property has not been effected.

17. The appellant would also accuse the Commissioner having not filed any document nor adduced any evidence in proof of the valuation adopted by him but adopting a valuation on the face value which would prejudically affect the rights of the appellant resulting in allotment of a less valuable share in his favour. The last but not the least reason under

which the appellant would be aggrieved is that the Courts below have failed to follow the decision of this Court reported in 1989-1-L.W.489 wherein it is clearly stated that the Commissioner should file such of those documents that he relies upon to fix the valuation of the property and should not adopt the valuation given by parties without any reasonable basis and without making a proper assessment thereof.

18. On the other hand, a cross objection filed by the respondent would only pertain to the mesne profits and the respondent/plaintiff would submit that the courts below erred in not awarding mesne profits especially when a specific direction has been given in A.S.No.76 of 1 987 on the file of the District Court, Cuddalore while remitting the matter for disposal to the trial Court with remarks to decide the point in the light of the observation made by it; that the said direction is final and ought to have been complied with. The crossobjection would further state that the cross-objector is entitled to compensation particularly when the appellant has been given a right of pathway over the land allotted to the cross-objector and therefore the Courts below should have awarded the excess value of the building and site which were allotted to the appellant.

19. In consideration of the grounds raised in the appeal by the defendant and the objections raised in the cross-objection by the plaintiff, if the substantial questions of law framed for determination of the above second appeal are considered, it could very easily be concluded in view of the clarification rendered on the part of the appellant that the consent was given only insofar as the shares of the appellant are concerned and not for the mode of division and it would not in any way affect the rights of the appellant to claim fair and equal division in respect of the shares allotted in his favour by means of the preliminary decree for which no suitable answer or reply comes forth from the respondent/plaintiff. Therefore, no question of res judicata would arise in this context and this Court is of the view that the appellant is entitled to be heard regarding the claim of fair and equitable division of his shares and therefore the consent given for partition of the properties would not in any way prevent the appellant nor would he in any manner become disentitled to claim proper and equitable division by metes and bounds. In this regard, it is only desirable for the Commission to make out the division of the properties following the principles laid in the judgment delivered by the Division Bench of this Court in MEHRUNNISA BEGUM AND ANOTHER vs. BEGUM NATHU BIBI AND OTHERS reported in 1989-1-L.W.489 requiring the Commissioner giving such details regarding the valuation made by him and if feasible causing production of the documents that were relied upon by him to arrive at such valuations.

20. Though no substantial question of law has been framed on the part of this Court regarding the claim of the plaintiff in the crossobjection, it comes to be seen that the respondent/plaintiff is genuinely aggrieved having not been considered for mesne profits in accordance with the directions issued by the first appellate Court, the Court of Principal District Judge, Cuddalore, as per its judgment rendered in A.S.No.76 of 1987 and the final decree Court shall also take into account the observations of the first appellate Court in view of the fact that the appellant has been

given a right of pathway over the land allotted to the cross-objector.

21. For all the above discussions held and conclusions arrived at, this Court is of the firm view that the above second appeal and the cross-objection shall be allowed and the matter be remanded to the original Court of final decree petition for proper consideration of the discussions held and the conclusions arrived at in the foregoing paragraphs of this judgment and to issue such directions to the Commissioner to take care of those relevant aspects prior to filing his report and sketch and hence the following judgment:
In result,
(i)Both the above second appeal and the cross-objection are allowed.
(ii)The judgment and decree dated 18.9.1991 rendered in A.S.No.37 of 1991 by the Court of District Judge, Cuddalore and the judgment and decree dated 31.10.1990 rendered in I.A.No.88 of 1983 in O.S.No.783 of 1980 by the Court of Subordinate Judge, Cuddalore are hereby set aside.

(iii)The subject matter is remitted back to the Court of Subordinate Judge, Cuddalore for proper appreciation of the same and to arrive at valid decisions as narrated in the preceding paragraphs.

(iv)Since it is a long pending matter, the Court of Subordinate Judge, Cuddalore is further directed to take up the matter out of turn and deal with the same even on day-to-day basis affording due opportunity for parties to be heard so as to deliver the judgment on merits and in accordance with law within six months from the date of receipt of a copy of this judgment.
(v)All the parties are directed to appear before the Court of Subordinate Judge, Cuddalore on 15.7.2003.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes
sl/Rao

To

1.The Principal District Judge,
Cuddalore.

2.The Subordinate Judge,
Cuddalore.

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